No. 13,403

United States Court of Appeals

For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., (a corporation),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

CHAUNCEY TRAMUTOLO,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Topical Index

Table of Authorities Cited

Cases

Statutes, Regulations, Etc. Pages

Appendix

No. 13,403

United States Court of Appeals
For the Ninth Circuit

West Coast Fast Freight, Inc., (a corporation),	*Appellant,*
vs.	
United States of America,	*Appellee.*

BRIEF FOR APPELLEE.

I.

PRELIMINARY STATEMENT.

Appellant herein was found guilty on thirteen counts charging it with knowingly and wilfully engaging in interstate commerce on a public highway as a common carrier by motor vehicle and as such carrier transporting shipments of dangerous explosives without there being in force with respect to appellant a certificate of public conveyance and necessity issued by the Interstate Commerce Commission authorizing such operations.

II.

JURISDICTION.

The offense is one against the United States under the provisions of the Interstate Commerce Act, Part II (49 U.S.C. 306(a)) and (49 U.S.C. 322).[1] Jurisdiction of the District Court is invoked by virtue of Title 18 U.S.C. 3231. Jurisdiction of the Court of Appeals arises by virtue of the provisions of Title 28 U.S.C. 1291.

III.

STATUTES AND REGULATIONS INVOLVED.

See Appendix, *infra.*

IV.

STATEMENT OF THE CASE.

Under the authority vested in it by the Interstate Commerce Act, Part II, the Interstate Commerce Commission issued to the appellant, West Coast Fast Freight, Inc., a certificate of public convenience and necessity authorizing it to operate in interstate commerce as a common carrier. Insofar as it is pertinent to this proceeding, this certificate authorized the appellant to transport in interstate and foreign commerce "general commodities, except dangerous explosives". Beginning on or about September 9, 1950, and continuing to about May 15, 1951, appellant en-

---

[1]See Appendix—Items 1 and 2 for text of these sections.

gaged in and did transport certain commodities, including the dangerous explosives herein concerned, from Oakland, California, to destinations in the States of Oregon and Washington.

Each of the said shipments of dangerous explosives originated at the Military Ammunition Installation at Herlong, California. They were loaded on trailers by military personnel under military authority and the trailers were thereupon sealed. Transportation was commenced by Wells Cargo, a certificated carrier which had authority to transport dangerous explosives between Herlong and the San Francisco Bay area. The contents of the trailers and the shipments therein were identified by Government bills of lading and the Wells Cargo freight bills. Wells Cargo made the haul from Herlong to Oakland, at which point the trailers containing the shipments were delivered to appellant. Each of the trailers containing the shipments herein concerned at all times remained sealed. The description of the contents as contained in the Wells Cargo freight bills and the Government bills of lading was accepted by appellant without challenge. Upon acceptance of the shipments appellant made and issued its freight bills (Exs. 3-22) wherein it charged itself with the transportation of the shipments therein described. The thirteen shipments upon which appellant was convicted were identified on appellant's freight bills (Exh. 3-22) as (1) detonating fuses, Count One; (2) explosive projectiles for cannon (Count Two); (3) rocket ammunition with empty projectiles (Counts Three and Seventeen); (4) am-

munition for cannon with explosive projectiles (Counts Two, Four, Twelve, Thirteen, Fourteen, Fifteen, Sixteen and Nineteen); (5) hand grenades (Count Nine); (6) black powder (Count Twenty). Appellants then transported said shipments to ultimate points of destination in Oregon and Washington.

V.

QUESTION PRESENTED.

Is the evidence in this case sufficient to sustain the conviction of the appellant for knowingly and wilfully engaging in interstate commerce on a public highway as a common carrier in violation of the terms of its certificate of public convenience and necessity?

VI.

SUMMARY OF ARGUMENT.

A. The finding of guilt by the District Court is correct and is sustained by competent evidence of record.

1. The extent of appellant's authority, as contained in its certificates, is stated in the form and in the language which are common in Commission practice.

2. The meaning of the term *dangerous explosives* has been determined by the Commission by its regulations, as well as by its independent decisions.

3. The shipping documents made and issued by the appellant were admissible and competent to prove the fact of transportation.

4. The evidence is sufficient to sustain the conviction of appellant for knowingly and wilfully engaging in interstate commerce on a public highway without a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such operation.

B. The remaining arguments advanced by appellant are subordinate and are not material to the issue.

1. Transportation for the United States Government, such as under consideration, is within the sole jurisdiction of the Interstate Commerce Commission.

2. The "primary jurisdiction" doctrine is inapplicable.

VII.

ARGUMENT.

A. THE FINDING OF GUILT BY THE DISTRICT COURT IS CORRECT AND IS SUSTAINED BY THE EVIDENCE OF RECORD.

1. The extent of appellant's authority, as contained in its certificate, is stated in the form and language common to Commission practice.

Although appellant has not directly raised the point, it has implied throughout the trial that the terminology of the certificate "commodities generally,

except dangerous explosives," is an innovation and is fraught with questionable meaning. This is not true. In *Coastal Tank Lines, Inc., et al. v. Charlton Bros. Transportation Company, Inc.,* 48 M.C.C. 289 (299) (1948) the Commission said "The term general commodities has been considered by the Commission to include all commodities other than those expressly excepted". In *Strickland Transportation Co. Inc., Extension—Dangerous Explosives,* 49 M.C.C. 595 (1949), the Commission in considering a similar verbatim exception (dangerous explosives) said that the "term is frequently used in describing a class of commodities specifically granted or excepted from the general commodity authorizations * * *"

Since the enactment of the Motor Carrier Act[2] in 1935, the Commission has issued hundreds of certificates containing the express prohibition, viz.: *except dangerous explosives,* in general commodity authority certificates.

Adams Transfer & Storage Company Application, 31 M.C.C. 231 (1941);

J. L. Barker Application, 41 M.C.C. 310 (1942);

Ernest E. Moore Application, 43 M.C.C. 91 (1944);

Lee Speirs Application, 47 M.C.C. 499 (1947);

Denver-Chicago Trucking Co.,—Extension, 53 M.C.C. 389 (1951);

Broadway Express, Inc.,—Extension, 54 M.C.C. 167 (1952).

---

[2]The title Motor Carrier Act was changed to Interstate Commerce Act, Part II, by the Transportation Act of 1940.

2. The meaning of the term dangerous explosives has been determined by the Commission's regulations as well as by its independent decisions.

These regulations have been established in accordance with the authority contained in Title 18 U.S.C. 835, originally enacted into law March 4, 1909 (35 Stat. 1134). Such *authority* is also contained in Section 204, Part II of the Interstate Commerce Act (49 U.S.C. 304). On August 16, 1940 (No. 3666) Regulations for Transportation of Explosives and Other Dangerous Articles by Land and Water in Rail Freight, Express, and Baggage Services, *and by Motor Vehicle* (Highway) and Water, became effective. The purpose of these regulations was to minimize the dangers to life and property incident to the transportation of explosives and other dangerous articles.

See:

Hughes Transportation, Inc.,—Extension, 46 M.C.C. 603(608).

These regulations are published in the Code of Federal Regulations (49 C.F.R. 71-78) and have the force of law. *Houff Transfer Inc. v. United States, et al.,* 105 Fed. Supp. 847.

Part 72 of said regulations contains the classification list of all explosives (and other dangerous articles). Explosives, therein, are classified as Class A, Class B and Class C. (Ex. 23 and 24.)

The explosives transported by appellant and which form the basis for the thirteen counts of the information upon which the appellant was convicted are, accordingly, classified (Tr. 145) as:

Detonating fuses	Class A
Explosive projectile for cannon	Class A
Ammunition for cannon with explosive projectiles	Class A
Hand grenades	Class A
Black powder	Class A
Rocket ammunition with empty projectiles	Class B

Since the promulgation of the regulations, with particular reference to motor carriers, the Commission has held that Class A and Class B explosives are "dangerous explosives".

Motor Carrier Safety Regulations (Ex Parte No. MC-13) Explosives, etc., 27 M.C.C. 63 (83) (1940);

Novick,—Extension of Operations—Explosives, 37 M.C.C. 696 (1942);

Buckingham Transportation Co.—Extension,—Explosives, 46 M.C.C. 1098 (1946);

Strickland Transportation Co. Inc.—Extension,—Dangerous Explosives, 49 M.C.C. 595 (1949);

M. I. O'Boyle and Sons, Inc., et al. v. Houff Transfer, Inc., 52 M.C.C. 307 (1950);

Consolidated Freightways, Inc.,—Extension—Explosives (1951), Docket No. M.C. 42487, Sub. No. 229. 8 Federal Carrier Cases 32,305 (Dec. 11, 1951).

From the *Consolidated Freightways, Inc.,* the following is quoted:

> "In our regulations governing the transportation of explosives and other dangerous articles, explosives are classed as dangerous, less dangerous, and relatively safe. A carrier authorized to transport general commodities except 'dangerous explosives' lawfully may transport those explosives which we have classified as 'relatively safe' but *not* those which we have classified as 'dangerous' whether more or less dangerous. Conversely, a carrier authorized to transport 'dangerous explosives' may transport only those commodities classified as 'dangerous' and 'less dangerous' in the above-mentioned regulations. See *Strickland Transportation Co., Inc., Ext.,—Dangerous Explosives,* 49 M.C.C. 595, 600. It is apparent from the record that applicant is cognizant of the Commission's classification of the various kinds of explosives and dangerous articles, and that the authority it is here seeking is to transport explosives of all types."

Appellant has laid considerable emphasis on what is called the "primary jurisdiction" doctrine. Consideration will be given to this subject later. However, one matter in connection with the argument is appropriate at this time.

Appellant points out (Tr. 85-110, inc.) that between the effective date of Tariff No. 6 (Ex. 24) and the effective date of Tariff No. 7 (Ex. 23) and on May 3, 1950, by supplement to Tariff No. 6, the phraseology used by the Commission to describe Class A-B-C explosives, respectively (Part 73.52) was changed. The argument is made that the new phraseology alters

the Commission's approach to the regulation of explosives, and in particular to the term "dangerous explosives".

As a result of continuing experiments in the field of explosives an article which is classified at one time as Class B may later be reclassified as Class C, or vice versa. However, regardless of the numerous descriptive revisions and commodity reclassifications resulting from progressive scientific research, at no time has the *classification* of the explosive articles herein concerned ever been changed. They were at the time of the violations here alleged and now are classified as Class A or Class B.

Exhibits 23 and 24 are re-publications of the Commission's explosive regulations independently compiled in the form as presented for the convenience of the motor carrier industry (as far as pertinent here). Appellant is named as a participating carrier[3] in each publication. These re-publications are referred to as *tariffs*. Because of the scientific and technical nature of the subject-matter requiring continuous exploration in the explosive field, the Commission maintains an open investigation docket resulting in frequent modifications and amendments to the regulations. These changes are reflected in the tariffs by supplements thereto. After so many supplements have been added and, mainly for the purpose of conveni-

[3]Generally speaking, a participating carrier in an explosive tariff is one authorized to transport explosives. Appellant is authorized to transport commodities, generally, *including* dangerous explosives over other segments of its routes not here involved.

ence, the tariff is re-issued in one volume which includes all supplements. The *changes* involve deletions, additions, alterations, re-classifications, re-descriptions, or instructions for handling—all required because of results of constant research in the scientific field.

In the *Strickland* case, supra, the Commission said:

> "One other matter is deserving of special comment and that is the identity of the commodities comprehended by the term 'dangerous explosives'. Notwithstanding that such term is frequently used in describing a class of commodities specifically granted or excepted from general commodity authorization, we have not heretofore specifically declared the commodities included in that term. *This does not mean, however, that we have left the term undefined or that it is indefinite.* In the Commission's regulations governing the transportation of explosives and other dangerous articles by rail freight, express and baggage service and by motor vehicle (highway) and water the various different explosives are classified as 'dangerous explosives', 'less dangerous', and 'relatively safe'. With this formal declaration of the commodities deemed, from a transportation standpoint, to be dangerous to a greater or lesser degree as contrasted with those which are deemed to be relatively safe, the proper construction of the term "dangerous explosives" as used in operating authorities of carriers is clear. A carrier authorized to transport general commodities, except dangerous explosives, lawfully can transport those explosives which the Commission has classified 'relatively safe', but not those which it has classi-

fied as 'dangerous' whether more dangerous or less dangerous." (Italics supplied.)

The language of the *Strickland* case was followed in *Consolidated Freightways, Inc.,—Extension,* supra (1951).

Furthermore, in Section 77.823 of the Code of Federal Regulations,[4] the Commission has prescribed that vehicles transporting explosives Class A and Class B must be placarded. Appellant admits that the subject vehicles carried the proper placards (Tr. 173). In Section 197.1 Code of Federal Regulations,[5] with respect to driving rules, the Commission has ordered: "* * * Nor shall any driver leave unattended any motor vehicle loaded with *dangerous or less dangerous* explosives * * *" (Italics supplied.) The foregoing two regulations since the original promulgation thereof have not been altered, changed or amended in any manner.

Appellant contends that since the Commission has amended its definition of explosives (49 C.F.R. 73.52), "that at least beginning in the year 1951, they (the Commission) desisted from their practice of describing in certificates, as an exception or otherwise, *dangerous explosives,* as defined in their regulations". (Tr. 99.) This is not a fact. No change has been made in the terminology of such certificates—it remains the same.

W. O. Harrington—Purchase, 57 M.C.C. 303 (Jan. 1951);

---

[4]See Appendix—Item 3 for full text of Regulation.
[5]See Appendix—Item 4 for full text of Regulation.

Denver-Chicago Trucking Co.—Extension, 53 M.C.C. 389 (Oct. 11, 1951);
Broadway Express, Inc.—Extension, 54 M.C.C. 167 (April 1952);
Southern Pacific Co.—Control, 58 M.C.C. 341 (April 1952).

It is indisputable that since 1940 the Commission has declared itself with respect to the determination of the meaning of the term *dangerous explosives.* It has without equivocation declared that explosive commodities having Class A or Class B characteristics are dangerous explosives.

3. The freight bills made and issued by the appellant were admissible and competent to prove the fact of transportation.

The principal evidence in support of the charges against appellant consisted of appellant's own freight bills containing thereon specific terms describing the commodity transported. (Exs. 3-22) (Tr. 159). The regulations required the appellant to prepare freight bills.[6] The articles transported were explosives and within the provisions of the Commission's regulations governing the preparation of shipping documents for the transportation of explosives. (49 C.F.R. 77.820.)[7] The said freight bills were prepared in accordance with the regulations in the regular course of business. 28 USCA 1732. See Appellant's Brief, Item 4, page 6, Appendix.

---

[6]See Appendix—Item 5 for full text of Commission's general order of October 5, 1939.

[7]See Appendix—Item 6 for full text of Regulation.

Under the authority of Title 49 U.S.C. Sec. 320(d) the Commission has prescribed regulations for the preservation of records (49 C.F.R. 203, et seq.—Preservation of Records) and also has made it mandatory upon common carriers to keep and produce such records for inspection upon demand by the Commission's agents.[8]

The admissibility of the records, particularly freight bills of motor carriers under the jurisdiction of the Interstate Commerce Commission, has been definitely established.

United States v. Alabama Highway Express, Inc., 46 F.Supp. 450, affirmed 325 U.S. 837, 65 S.Ct. 1274 (1945);

Zimberg v. United States, 142 F.2d 132 (C.A. 1), cert. den. 323 U.S. 712;

United States v. Deardorff, 40 F. Supp. 512 (1941);

United States v. Schupper Motor Lines, Inc., 77 F. Supp. 737 (1948);

United States v. Kessler, 63 F. Supp. 964 (E.D. Pa.).

In the *Alabama* case, supra, the admissibility of motor carrier records was attacked on the ground of "unlawful search and seizure". After reviewing the applicable law and regulations, particularly the provisions of Title 49 U.S.C. Sec. 320(d) the Court admitted the records and, in denying the motion to suppress, said:

---

[8]See Appendix—Item 7 for full text of Regulation authorizing inspection of records.

"Our conclusion that there is nothing illegal or unconstitutional in the procedure of discovery pursued by the Commission as complained of in the motion to suppress, is necessarily and properly influenced by the fact that motor carriers operating under the franchises provided in our federal statutes are public utilities. As such, they are subject to the highest degree of accountability to the public, the public being represented by the administrative agency charged with supervision of their business, in this case the Interstate Commission. This accountability naturally allows the motor carrier less protection and privacy than the ordinary citizen enjoys in his private business. To accord a public utility the same constitutional guarantees of privacy would frustrate the public welfare and tend to minimize the public interest in the utility. Far from being condemned as unconstitutional, complete inspection by duly authorized agents of the Commission must be expected by motor carriers as part of the price of functioning in the utility field."

In the *Deardorff* case, supra, the Court held that a summary prepared by a government special agent of facts and figures taken from business records in the main office of a motor carrier was admissible.

In each of these cited decisions the Court recognizes a doctrine of necessity. A common carrier could defeat the very purpose of regulation if it failed to issue appropriate shipping documents at the time the transportation is performed. The legislation anticipated this factor and provided the methods to avoid it.

In this case the appellant challenges the admissibility of the freight bills on the ground of hearsay. It claims hearsay, first, because the descriptive information contained on the bills was copied from the descriptive information contained on the originating carrier's (Wells Cargo) freight bills; and, second, it was compelled to accept the word of others in the preparation of its own freight bill because the vehicles were sealed during all the time they were in its possession and consequently no opportunity was afforded to inspect the contents and confirm the identity thereof. (Appellant's Brief 43.)

The record shows that the freight bills admitted in evidence were made and issued by the appellant at its Oakland terminal who copied thereon the description identifying the articles as stated on the originating carrier's freight bill. (Tr. 159, 160.) Appellant followed the usual custom and practice of the motor carrier industry in preparing freight bills from the information contained on the shipping documents of others—*without* personal inspection of each article of each shipment transported. Appellant's traffic manager, Mr. I. W. Shepherd, testified that it handled between 40,000 and 60,000 separate shipments during the month of September, 1950. (Tr. 182.) Appellant did not challenge the contents of the sealed trailers containing the shipments concerned herein, as described by the Government bills of lading and the Wells Cargo freight bills. On the contrary, said descriptions were accepted by appellant in preparing

further freight bills, and in transporting the shipments to point of destination.

Appellant's contention that because the cargo moved in sealed vehicles, it had no alternative but to accept the articles as described by others, is without merit. When transporting explosives for any shipper it is the usual practice from a safety standpoint to seal all vehicles which are physically possible to seal. There is no evidence that the shipments out of the government ammunition depot at Herlong were "guarded" or a military secret, although appellant would have the Court believe that the military officials might have deliberately misdescribed the articles to avoid the disclosure of a military secret. (Tr. 77.) A carrier may inspect the contents of a sealed vehicle whenever it so desires and if inspection is refused, transportation may be declined. On the face of the Wells Cargo freight bill and the Government bill of lading appellant did not have authority to undertake transportation of the shipments in question. Appellant deliberately and wilfully undertook the transportation notwithstanding lack of authority.

Silver Fleet Motor Express v. Abe Prebul, 7 Fed. Carrier Cases 80579 (not found reported elsewhere).

The law necessarily contemplates that when a carrier executes and issues the required shipping document, such shipping document becomes *ipso facto* the best evidence of the fact which it represents, regardless of the source of information. To discover a motor carrier in the act of violating the law is extremely

unusual. Constant surveillance of each motor carrier is neither possible nor practicable. Violations when detected, such as here, have usually been committed months previously.

Appellant was charged with violating its operating authority by shipping articles herein concerned. The best evidence of its deliberate act is the freight bills which it prepared for the shipment. Appellant therein described certain *explosives* which the Explosives and Other Dangerous Articles Tariff Nos. 6 and 7 (Ex. 24 and 23) were classified as *Class A* and *Class B* explosives. Tariff No. 6 (Ex. 24) uses the words "Class A Explosives, dangerous"; "Class B Explosives, less dangerous". Tariff No. 7, Ex. 23, uses the words "Class A Explosives, detonating, maximum hazard"; "Class B Explosives; flammable hazard". There was, and could be, no question that appellant was fully informed of the nature, danger and explosive characteristics of the shipments. As a matter of law, appellant was charged with notice of the contents imposing upon it responsibility for all precautionary measures required by the regulations incident to undertaking transport. Likewise they were charged with notice as to their operating authority.

See:

Lehigh Valley v. State of Russia, 21 F. (2d) 396, 403, Cert. den. 275 U.S. 571, 72 L.Ed. 432.

Appellant in its brief at page 57 states, "appellant as a common carrier, had a duty to accept the goods for transportation if it could do so under its certifi-

cate". Appellant also had a duty not to accept goods for transportation if it could not do so under its certificate. Appellant did not have authority to transport the goods herein. It deliberately did transport said goods and now seeks to avoid responsibility on a spurious claim of hearsay.

4. Appellant transported the prohibited commodities—dangerous explosives—knowingly and willfully within the meaning of the statute.

The Interstate Commerce Act, Part II (49 U.S.C. Sec. 306(a)) is remedial legislation and should be liberally construed to effect its intended purpose. (*I.C.C. v. A. W. Stickle & Co.,* 41 F. Supp. 268.) The judicial construction of the words knowingly and wilfully was early considered in *Armour Packing Co. v. United States,* 153 Fed. 1, affirmed 209 U.S. 56, in a case involving violations of the Interstate Commerce Act. The Court said, page 23:

> "* * * a corrupt purpose, a wicked intent to do evil, is indispensable to conviction of a crime that is morally wrong. But no evil intent is essential to an offense which is mere malum prohibitum. A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense, which is not malum in se."

The authorities in support of this decision, are, literally, too numerous to mention. However, in *Boone v. United States,* 109 Fed. (2d) 560, the defendant had two different types of rates in effect, a proportional rate and a transit rate—each applying separately to different situations. The transit rate was

the lowest. Defendant was charged with applying the transit rate in a situation which required the application of the proportional rate and was convicted of granting concessions under the Elkins Act. Boone contended that the tariffs were confusing and that he acted under an honest belief that the transit rates were applicable—upon a finding of guilty the Court said:

> "The penalty is not imposed for unwitting failure to comply with a statute but for intentionally, carelessly, knowingly or voluntarily disregarding the provisions of the act, and its violation requires neither evil purpose nor criminal intent."
>
> *U. S. v. Illinois Central Railroad Co.,* 303 U.S. 239, 243, 82 L. Ed. 773.

See also:

Ellis v. U. S., 206 U.S. 246, 257.

In *Houff Transfer, Inc. v. United States, et al.,* 105 Fed. Supp. 847 the Court had before it a matter involving the transportation of explosives and other dangerous articles, and said:

> "The regulations at present may be found in CFR, Title 49, Parts 71-78. This is, of course, a part of the law governing motor carriers and of which they are bound to have knowledge."

See also:

United States v. Gunn, et al., 97 F. Supp. 476;
Kempl v. United States, (8th Cir.) 151 F. (2d) 680;

Boyce Motor Lines v. United States (1951), 188 F. (2d) 889 (C.A. 3) Aff. (1952), 342 U.S. 337.

Appellant contends that it did not know what the words dangerous explosives meant and that it sought the advice of legal counsel for the purpose of "clarification". (Tr. 188; Tr. 193, Ex. 2.) The attorney consulted was William B. Adams, an Interstate Commerce Commission practitioner of twenty years' standing. Mr. Shepherd testified (Tr. 190) that the services of Mr. Adams were employed for the purpose of filing the application (Ex. 2) with the Interstate Commerce Commission under its established procedures. Appellant argues at page 56 of its brief: "Appellant took prompt steps in an effort to ascertain and clarify the meaning of the language". Appellant did not make application "to ascertain and clarify the meaning of the language"—it applied for an *extension* of authority. An application for interpretation or clarification of a certificate is distinctly different from an application for extension of authority. (*Builders Express, Inc.—Interpretation of Certificate,* 51 M.C.C. 103; *Convoy Co.—Interpretation of Certificate,* 52 M.C.C. 191.)

Exhibit 2 is the application for an extension of operating authority by which the Commission was requested to remove the exception contained in appellant's certificate, namely, *dangerous explosives.* This original application, Docket No. MC-55905 (Sub-No. 34) was filed with the Commission on October 24, 1950, some 45 days after the date of the first count

alleged in the information. The appellant amended its application on January 9, 1951. The amended application requested extension of appellant's existing operating authority to include:

> "Explosives of all types, including *dangerous explosives* * * *"

On December 26, 1951 the Commission entered its order (part of Ex. 2) denying the application. In making its decision the Commission observed that:

> "Applicant can now transport *dangerous explosives* between Tacoma and Ellensburg, Washington, and Missoula, Montana; between Spokane and Coeur d'Alene, Idaho; between Tacoma and Steilacoom, Washington * * *"
>
> "During World War II it transported *dangerous explosives* under temporary authority over its authorized routes.
>
> "Applicant asserts that it has been tendered shipments of *dangerous explosives* which it was unable to accept because it lacked appropriate authority to effect delivery." (Italics supplied.)

The sum and substance of the foregoing is that the appellant knew that some of the articles which it was transporting out of Oakland, California were Class A and Class B explosives, and as such they were dangerous explosives for the transportation of which it did not have authority. The application for extension of authority is conclusive as to appellant's knowledge.

B. THE REMAINING ARGUMENTS ADVANCED BY THE APPELLANT ARE WITHOUT MERIT.

1. Submission of a copy of appellant's certificate to appropriate military authorities in Washington is immaterial. Transportation for the United States Government, such as under consideration here, is within the sole jurisdiction of the Interstate Commerce Commission.

In appellant's brief (pages 16 and 57) mention is made of the fact that "before handling any traffic of any kind from the Sierra Army Ordnance Depot at Herlong, California, appellant submitted a copy of its certificate to the appropriate military authorities in Washington, D. C." It is stated also that Section 22 quotations (rates) were submitted to Army officials. The implication is that the rates were agreed upon and accepted and that the transportation was approved.

It is true that under Section 22, Part I, Interstate Commerce Act, carriers can transport property for the government at "free or reduced rates" which need not be filed with the Interstate Commerce Commission. However, in the performance of a transportation service for any shipper *including* the government or any independent agency thereof, the carrier is subject at all times to the certificate provisions of the Interstate Commerce Act, Part II (49 U.S.C. Section 306(a)).

Mack Brothers Extension—July 17, 1952 (Not printed in Commission Reports), 9 Carrier Cases 32,533);

W. O. Harrington—Purchase—Strickland, 57 M.C.C. 303.

When a carrier files rates with the Interstate Commerce Commission covering transportation which it is not authorized to perform, such rates are immediately rejected or cancelled by the Commission.

Powder, from Parsons, Kan. to East Alton, Ill., 52 M.C.C. 471—March 13, 1951.

Appellant on page 57 of its brief, in the last sentence of the paragraph under "2. Statement of Argument" states: "Appellant, as a common carrier, had a duty to accept the goods for transportation if it could do so under its certificate". Appellant admittedly charges itself with the responsibility of conducting its operations within the authority of its operating certificate. Such responsibility reposes solely upon appellant. The "military authorities" have no jurisdiction to alter this operating authority of appellant or any other carrier. The Interstate Commerce Commission is the sole determinant in these matters.

2. The "Primary Jurisdiction" doctrine is inapplicable.

Appellant has charged error to the lower Court in that the Court undertook to make an independent finding of fact as to the meaning of the words "except dangerous explosives" as used in the certificate of convenience and necessity, contrary to established rules of law that the primary jurisdiction to define said words is with the Interstate Commerce Commission. Appellant states on page 24 of its brief:

> "Pursuant to a principle of law which has come to be known as the 'primary jurisdiction doctrine' first announced in *Texas & Pacific R. Co. v.*

> *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L.Ed. 553 (1907), the United States Supreme Court has held that in situations of the general type here presented primary resort to the Interstate Commerce Commission is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission."

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, involved a suit by an oil company to recover a sum of money claimed to have been the payment of an unjust and unreasonable rate. The question was "whether consistently with the act to regulate commerce there was power in the Court to grant relief on the finding that the rate charged for an interstate shipment was unreasonable." The lower Court said yes. The Supreme Court held that a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce primarily make redress through the Interstate Commerce Commission which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable * * * and reversed and remanded. On page 439, the Court said:

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these

subjects was among the principal purposes of the act."

* * * * * * *

"And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law."

Page 440.

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a pref-

> erence or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

In *Great Northern Ry. v. Merchants Elevator Co.,* 259 U.S. 285, Justice Brandeis distinguished between controversies which involve only questions of law and those which involve issues, essentially of fact or call for the exercise of administrative discretion, and held that cases involving no question of fact and no question of administrative discretion are within the Court's jurisdiction without preliminary resort to the Interstate Commerce Commission. On page 294 the Court said:

> "In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co. Case,* or in the *Loomis Case.* Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

In *Civil Aeronautics Board v. Modern Air Transport,* 179 F.2d 622 (CA-2),[9] a preliminary injunction was granted restraining Modern Air from engaging in air transportation in violation of Sec. 40(a) of

---

[9]Appellant has erroneously cited the case as of the 9th Circuit Court of Appeals.

the Civil Aeronautics Act of 1938, 4 U.S.C.A. Sec. 48(a). Defendant relied on "what has come to be known as the doctrine of primary administrative jurisdiction." At page 624 the Court said:

> "Under this doctrine the courts will not determine a question within the jurisdiction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. 42 Am. Jur. 698-702. This self-denying doctrine has been used by the courts as a ground for refusing to decide the difficult issues of reasonableness of a rate or fairness of a regulation which fall within the area of special competence of the particular administrative agency and for which the agency is said to have primary jurisdiction. 51 Harv. L. Rev. 1251. But this doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus it has been continuously asserted that courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness. W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 299 U.S. 393, 57 S.Ct. 265, 81 L.Ed. 301; Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578; Burrus Mill & Elevator Co. of Oklahoma v. Chicago, R. I. & P. R. Co., 10 Cir. 131 F.2d 532, certiorari denied 318 U.S. 773, 63 S.Ct. 770, 87 L.Ed. 1143."

On page 37 of its brief appellant states: "The doctrine applies to criminal proceedings as well as

in civil matters", and cites *U. S. v. Pacific & Arctic R. & N. Co.,* 228 U.S. 87, and *Hancock Mfg. Co. v. U. S.,* 155 F.2d 827 (CA-6 1946).

It is difficult to determine what comfort appellant derives from these two cases. In *U. S. v. Pacific & Arctic Co.,* a six count indictment for alleged violation of the Sherman Antitrust Act and the Interstate Commerce Act reached the Supreme Court after a demurrer in the lower Court had been sustained. Counts 3-4-5 are the only ones with which we need be concerned. Unlawful discrimination in the transportation of freight and passengers is charged. The Court said, on page 107: "* * * the Interstate Commerce Act * * * is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission." And on page 108: "The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases; and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

In *Hancock Mfg. Co. v. U. S.* an information containing eighteen counts, charged unlawful, knowing solicitation, acceptance and receipt of a concession in that the carrier did transport pieces of automobile parts, etc., not otherwise indexed in the governing

classification and charged and collected from the defendant less than the charge and compensation specified in the tariff. The case turned on whether the parts were "blanks, stampings, or unfinished shapes *in one piece* not further finished" and were *"in one piece not advanced in the state of manufacture beyond the stamping process."*

The difficulty from the evidence was that the word "stampings" was indefinite and uncertain in its meaning and "fixes no immutable standard" which a Court may recognize as a matter of law. The Court said, page 831: "In reality it presented a question of fact the determination of which in a civil case has been adjudged to be with a body of experts." The Court further said: "* * * the evidence as presented is not sufficient to support a verdict of guilty beyond a reasonable doubt." The judgment was reversed "* * * not only upon the grounds that the word 'stampings' is too vague and indefinite but that the evidence submitted is insufficient to support a verdict beyond a reasonable doubt."

The operating certificate of appellant herein contained an exception to a general commodity authority. This exception was "except dangerous explosives." The applicable tariffs, Nos. 6 and 7 (Exh. 24 and 23) placed each of the articles transported and on which appellant was convicted, in Class A or Class B explosives. Tariff No. 6 as to Class A explosives contained the additional word "dangerous", and as to Class B explosives the additional words

"less dangerous". In Tariff No. 7, the tariff controlling at the time of the violations, the word "dangerous" as to Class A explosives was changed to "detonating, maximum hazard" and as to Class B explosives the words "less dangerous" were changed to "flammable hazard". Appellant's contention is that by these changes appellant became *confused* and *uncertain* as to what were "dangerous explosives" under its operating certificate; that confusion and uncertainty is the natural condition of these words and that it is the Commission's "primary jurisdiction" to brush off the dust of confusion.

It is difficult to attribute sincerity to appellant's contention. The commodities concerned were continuously classified as Class A or Class B explosives. The change of the words "dangerous" and "less dangerous" to "detonating, maximum hazard" and "flammable hazard" does not detract from the "dangerous" nature of Class A and Class B explosives, but rather enhances it.

The determination of the classification of various dangerous commodities has been accomplished by the Commission over the years after repeated scientific inquiry. There is and can be no doubt, uncertainty or confusion that the commodities classified as Class A and Class B explosives are dangerous. There was no doubt in appellant's mind as is clearly shown by the testimony and the application for extension of operating authority. Determination in first instance of what articles constitute explosives and dangerous articles for which the Interstate Commerce Commission must

formulate regulations for safe transportation rests with the Commission, and the Court should not attempt wholesale review of Commission regulations for purpose of amendment at the instance of one whose certificate of authority precludes carriage of all articles so classified. *Houff Trans. Inc. v. U. S.*, 105 F. Supp. 847.

VIII.

CONCLUSION.

Appellee submits that guilt in this case was established beyond any reasonable doubt, and that the judgment of the District Court is correct and should be sustained.

Dated, San Francisco, California,
October 27, 1952.

CHAUNCEY TRAMUTOLO,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

ITEM 1.

Interstate Commerce Act, Part II (49 USC 306 (a)), provides:

(a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation: * * *

ITEM 2.

Interstate Commerce Act, Part II (49 USC 322 (a)), provides:

(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

ITEM 3.

49 Code of Federal Regulations 77.823—Marking on motor vehicles and trailers other than tank motor vehicles—provides:

(a) Every motor vehicle transporting any quantity of explosives, class A, poison gas, class A, or radioactive material, poison class D requiring red radioactive materials label; and every motor vehicle transporting 2,500 pounds gross weight or more of explosives, class B, flammable liquids, flammable solids or oxidizing materials, corrosive liquids, compressed gas, class B poisons, and tear gas, or 5,000 pounds gross weight or more of two or more articles of these groups shall be marked or placarded on each side and rear with a placard or lettering in letters not less than 3 inches high on a contrasting background as follows:

(1) Explosives, class A.....EXPLOSIVES
(2) Explosives, class B .....DANGEROUS
(3) Flammable liquid .....DANGEROUS
(4) Flammable solid .....DANGEROUS
(5) Oxidizing material .....DANGEROUS
(6) Corrosive liquid .....DANGEROUS
(7) Compressed gas .....COMPRESSED GAS
(8) Poison gas, class A.....POISON GAS
(9) Tear gas .....DANGEROUS
(10) Poisons, class B .....DANGEROUS
(11) Dangerous, class D poison .....DANGEROUS—RADIOACTIVE MATERIAL

ITEM 4.

49 Code of Federal Regulations 197.1. Driving rules—(a) Motor vehicles not to be left unattended:

No driver of a motor vehicle transporting any explosive or other dangerous article shall leave such motor vehicle unattended upon any public street or highway, except when such driver is engaged in the performance of normal operations incident to his duties as the operator of the vehicle to which he is assigned; nor shall any driver leave unattended any motor vehicle loaded with dangerous or less dangerous explosives upon any public street or highway, or elsewhere during the course of transportation. Nothing contained in this section shall be construed to relieve the driver of any requirement for the protection of any such motor vehicle left unattended upon any public street or highway, as provided in Part 193 of this chapter.

ITEM 5.

49 Code of Federal Regulations 172.1—Information to be shown—provides:

(a) Every common carrier by motor vehicle subject to the jurisdiction of this Commission shall, on and after the first day of January, 1937, cause to be shown on the face of each and every receipt or bill of lading issued for the transportation of property by such carrier in interstate or foreign commerce, information which shall include the names of the consignor and consignee; the points of origin and desti-

nation; the number of packages, description of the articles, and weight, volume of measurement (if the lawfully applicable rates or charges are published to apply per unit of weight, volume or measurement) of the property received; and a record of this information shall be kept by the carrier by the preservation of a copy of such receipt or bill of lading.

(b) Every common carrier by motor vehicle subject to the jurisdiction of this Commission shall, on and after the first day of January, 1937, when collecting transportation charges, issue a freight or expense bill covering each shipment, and the original of such freight or expense bill shall be receipted on payment of the transportation charges and furnished to the shipper or the receiver, whichever may pay the charges; and shall cause to be shown on the face thereof the names of the consignor and consignee (except that as to reconsigned shipments the freight or expense bill shall not show the name of the original consignor); the date of shipment; the points of origin and destination (except that as to reconsigned shipments the freight or expense bill shall not show the original shipping point unless the final consignee pays transportation charges upon such original shipping point; the number of packages, description of the articles, and weight, volume or measurement of the property transported (if the lawfully applicable rates or charges are published to apply per unit of weight, volume or measurement); the exact rate or rates assessed; the total charges to be collected including a statement

of the nature and amount of any charges for special service and the points at which such special service was rendered; the route of movement indicating each carrier participating in the transportation service, and the transfer point or points through which the shipment moved; and a record of this information shall be kept by the preservation of a copy of such freight or expense bill.

ITEM 6.

49 Code of Federal Regulations 77.819—Certificate —provides:

(a) Except as provided in this section, no motor carrier may accept for transportation or transport any class A or class B explosives, blasting caps or electric blasting caps in any quantity, or any dangerous articles requiring label as prescribed by Part 73 of this chapter, unless it be certified to him by the shipper's name inserted in the certificate on the label or by the following certificate over the written or stamped facsimile signature of the shipper or his duly authorized agent in the lower left-hand corner of the manifest, memorandum receipt, bill of lading, shipping order, shipping paper, or other memorandum:

> This is to certify that the above named articles are properly described, and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

(b) For the relief of shippers from multiplicity of certifications required for packages which may move by various means of transportation, shipments may be certified for rail, motor vehicle, water, or air transportation by adding to the certificate required on the shipping document "and the Commandant of the Coast Guard", or "and the Civil Air Regulations", as the case may be.

49 Code of Federal Regulations 77.820—Waybills, manifests, etc.—provides:

(a) The waybill, manifest, dispatch, memorandum receipt, bill of lading, transfer sheet, or interchange record, when prepared for shipments and used for transferring such shipments to a connecting carrier, must properly describe the articles by name as shown in 72.5 of this chapter, and show color of label applied.

ITEM 7.

49 Code of Federal Regulations 177.1—Examination of records and accounts—provides:

Each and every motor carrier and broker subject to Part II of the Interstate Commerce Act, and receivers, trustees, and representatives having control, direct or indirect, over or affiliated with any such motor carrier or broker, upon the demand of a special agent or an examiner of the Commission, and upon the presentation of proper credentials, shall forthwith permit such special agent or examiner to inspect and examine all such lands, buildings, or equipment of

motor carriers and brokers used in connection with interstate or foreign operations, and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing and kept or required to be kept by motor carriers and brokers subject to the act, and permit such special agent or examiner to make notes and copies of such papers as he deems wise.

(49 Stat. 546, as amended; 49 U.S.C. 304. Interprets or applies 49 Stat. 563, as amended; 49 U.S.C. 320 [4 F.R. 4191].)